

**EPA's Review of Revisions to Indiana's Antidegradation Policy
and Implementation Procedures at 327-IAC 2-1.3
Under Section 303(c) of the Clean Water Act (CWA)
WQSTS # IN2012-439**

Date: SEP 27 2012

I. Summary:

A. Date received by EPA: July 25, 2012

B. Submittal History:

- First Notice of Comment Period: October 15, 2008, Indiana Register (DIN: 20081015-IR-327080764FNA).
- Second Notice of Comment Period: December 16, 2009, Indiana Register (DIN: 20091216-IR-327080764SNA).
- Notice of Public Hearing: December 16, 2009, Indiana Register (DIN: 20091216-IR-327080764PHA).
- Change in Notice of Public Hearing: May 25, 2011, Indiana Register (DIN: 20110525-IR-327080764CHA).
- Date of First Public Hearing to consider Preliminary Adoption: July 27, 2011.
- Change in Notice of Public Hearing: August 24, 2011, Indiana Register (DIN: 20110824-IR-327080764CHA).
- Date of Second Public Hearing to consider Preliminary Adoption: September 14, 2011.
- Proposed Rule: December 7, 2011, Indiana Register (DIN: 20111207-IR-327080764PRA).
- Notice of Public Hearing: December 7, 2011, Indiana Register (DIN: 20111207-IR-327080764PHA).
- Fiscal Impact Statement: December 7, 2011, Indiana Register (DIN: 20111207-IR-327080764FIA).
- Change in Notice of Public Hearing: January 18, 2012, Indiana Register (DIN: 20120118-IR-327080764CHA).
- Date of Public Hearing to consider Final Adoption: March 14, 2012.

C. Documents included in the submittal:

- Final Rule.
- Cover Sheet for Binder 1.
- Binder 1, #1 - First Notice of Comment Period, October 15, 2008 - received 17 comment letters.
- Binder 1, #3 Third Notice of Comment Period, December 7, 2011 - received 15 comment letters.

- Binder 1, #4 - Copies of written comments received at the first public hearing on July 27, 2011 to consider preliminary adoption - 6 comment letters.
- Binder 1, #5 - Copies of comments submitted by deadline of July 29, 2011 at the request of the Water Pollution Control Board at the first public hearing on July 27, 2011 - received 8 written comments.
- Binder 1, #6 - Copies of written comments received at the second public hearing on September 14, 2011 to consider preliminary adoption - 4 comment letters.
- Binder 1, #7 - Copy of the written comment received at the public hearing on March 14, 2012 to consider final adoption - 1 comment letter. Note: this comment was presented by board member, Dennis Wene, of Alcoa, representative of the industrial sector. The Water Pollution Control Board discussed and voted on his suggested rule language modifications, which were subject of his comments, and the board voted not to adopt Mr. Wene's suggested rule language changes.
- Binder 1, #2 - Second Notice of Comment Period - December 16, 2009 - received 31 comment letters.
- Binder 2, #10 - Summary/Response to Comments from the Third Comment Period.
- Binder 2, #11 - Summary/Response to Comments from the Public Hearing to consider preliminary adoption on July 27, 2011.
- Binder 2, #12 - Summary/Response to Comments from the Public Hearing to consider preliminary adoption on September 14, 2011.
- Binder 2, #8 - Summary/Response to Comments from the First Comment Period.
- Binder 2, #9 - Summary/Response to Comments from the Second Comment Period.
- Letter from Martha Clark Mettler, Deputy Assistant Commissioner, IDEM to Tinka Hyde, EPA re: Submission of Indiana's Antidegradation Standards and Implementation Procedures Rule.
- Binder 2 - Cover Sheet.
- ESA Critical Habitat Designations in Indiana.
- Guide to Key Citations Referenced in draft final Antidegradation.
- Indiana Code Citations Definitions regarding Antidegradation.
- NRC Info Bulletin #2.
- Indiana's Outstanding State Resource Waters (OSRWs).
- State of Indiana Endangered Species.

D. Other supporting documents: None

E. Description of Action:

These rules consist of a revised antidegradation policy and comprehensive implementation procedures applicable to all surface waters in Indiana. With these rules, Indiana addresses a long-standing deficiency in Indiana's water quality standards of a lack of defined implementation procedures as required by 40 CFR 131.12.

F. Basis of Action:

These rules are needed to allow Indiana to satisfy the requirements of the federal regulations at 40 CFR 131.12.

II. Areas Affected and Environmental Impacts:

A. Area Affected:

These rules affect the entire state of Indiana.

B. Environmental Impacts:

1. Aquatic Life

These rules will ensure that existing aquatic life uses are protected and that any lowering of water quality in waters where the quality is better than that required by the Indiana water quality standards to protect aquatic life will only be allowed if the lowering is necessary to accommodate important social and economic development in the area affected by the lowering of water quality.

2. Human Health

These rules will ensure that existing uses are protected and that any lowering of water quality in waters where the quality is better than that required by the Indiana water quality standards to protect human health will only be allowed if the lowering is necessary to accommodate important social and economic development in the area affected by the lowering of water quality.

III. CWA Sections 101(a)(2)/303(c)(2)/118(c)(2)/40 CFR 131 and 132 Review:

A. EPA's authority under section 303(c)(2) of the CWA

Water quality standards requirements of CWA sections 101(a)(2) and 303(c)(2) are implemented through federal regulations contained in 40 CFR 131; water quality standards requirements of CWA section 118, specific to waters of the Great Lakes System, are implemented through federal regulations contained in 40 CFR 132. Federal regulations at 40 CFR 131.21 require EPA to review and approve or disapprove state-adopted water quality standards. In making this determination, EPA must consider the following requirements of 40 CFR 131.5:

- whether state-adopted uses are consistent with CWA requirements;
- whether the state has adopted criteria protective of the designated uses;
- whether the state has followed legal procedures for revising its standards;
- whether state standards are based on appropriate technical and scientific data and analyses; and
- whether the state's submission includes certain basic elements as specified in 40 CFR 131.6.

Section 101(a)(2) of the CWA specifies that designated uses “provide for the protection and propagation of fish, shellfish, and wildlife and provide for recreation in and on the water.” Section 303(c)(2) of the CWA requires that standards shall protect the public health and shall take into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational, agricultural, industrial, and navigational purposes.

EPA is required to review and approve new and revised water quality standards submitted by States and Tribes. Possible EPA actions include:

- **Approval** (where EPA has concluded that approval of certain revisions will have no effect on listed species, or is otherwise not subject to ESA consultation),
- **Approval subject to ESA consultation** (where EPA has concluded that certain revisions may effect listed species (including beneficial effects)),
- **Disapproval** (where EPA has concluded that certain revisions do not meet the requirements of the CWA or federal regulations and guidance), and
- **No EPA action** (where EPA has concluded that certain revisions are not revisions to the State’s or Tribe’s water quality standards and therefore do not need to be reviewed under Section 303(c) of the CWA).

Consistent with federal regulations at 40 CFR 131.21, new or revised water quality standards do not become effective for CWA purposes until they are approved by EPA.

B. EPA’s Review of Draft Rules

EPA’s comments on the draft rules are provided in Appendix 1.

C. EPA’s Review of Indiana’s Final Rules

1. Review of Submittal for Completeness

Regulatory Requirement:	Indiana’s Rule Submittal:
Use designations consistent with the provisions of section 101(a)(2) and 303(c)(2) of the Act (40 CFR 131.6(a))	NA. These rule revisions do not affect Indiana’s existing, effective designated uses.
Methods used and analyses conducted to support WQS revisions (40 CFR 131.6(b))	Provided, see list of documents provided by Indiana.
Water quality criteria sufficient to protect the designated uses of Wisconsin surface waters (40 CFR 131.6(c))	NA. These rule revisions do not affect Indiana’s existing, effective water quality criteria.
An antidegradation policy consistent with §131.12 (40 CFR 131.6(d))	Provided.
Certification by the State Attorney General or other appropriate legal authority within the State that the WQS were duly adopted pursuant to State law. (40 CFR 131.6(e))	Provided.

General information which will aid the Agency in determining the adequacy of the scientific basis of the standards which do not include uses specified in section 101(a)(2) of the Act as well as information on general policies applicable to State standards which their application and implementation. (40 CFR 131.6(f))	NA for uses less than 101(a)(2). These revisions do not affect Indiana's designated uses. Indiana's rules include implementation procedures for Indiana's antidegradation policy as required by the federal regulations at 40 CFR 131.12.
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2. Indiana's responses to comments on draft rules

EPA's comments on the draft rules:

EPA commented on the second notice. A copy of the substantive comments is provided in Appendix 1. Each of the specific comments and Indiana's response is discussed below.

Definition of "pollutant of concern": Under Indiana's proposed rules, antidegradation applied to new or increased discharges of "pollutants of concern" and the term, "pollutant of concern" was defined as a pollutant that is reasonably expected to be present in a new or increased discharge, and in the receiving water in sufficient amounts to have a potentially detrimental effect on the designated or existing uses of the receiving water. In previous responses to comments, IDEM indicated that it would consider a pollutant to be present in sufficient amounts to have a detrimental effect on designated uses if the pollutant were present in concentrations at or near those triggering permit limits.

EPA commented that this definition was inconsistent with the federal antidegradation regulations at 40 CFR 131.12(a)(2) because it failed to provide protection of high quality waters as required by the regulations. EPA recommended deleting the term from the final rules.

In the final rules, Indiana deleted the term as recommended by EPA and revised the applicability statement to state that Indiana's antidegradation rules apply to, "a proposed new or increased loading of a regulated pollutant to surface waters of the state from a deliberate activity subject to the Clean Water Act, including a change in process or operation that will result in a significant lowering of water quality." Indiana's rules define the term, "regulated pollutant" as, "any parameter of a pollutant as defined in subdivision (39) for which water quality criteria have been adopted in or developed pursuant to 327 IAC 2-1 or 327 IAC 2-1.5; including: narrative and numeric criteria; and nutrients, specifically phosphorus and nitrogen; and excluding biological criteria; pH; and dissolved oxygen;" as well as other parameter of a pollutant as defined in subdivision (39) that may be limited in an NPDES permit as a result of, but not limited to: best professional judgment; new source performance standards; best conventional pollutant control technology; best available technology economically achievable; or best practicable control technology currently available; for the appropriate categorical guidelines of 40 CFR 400 to 40 CFR 471." This results in application of Indiana's antidegradation rules in a manner that is consistent with 40 CFR 131.12(a)(2).

Use of a less stringent *de minimis* threshold for new or increased loadings of pollutants without numeric water quality criteria or data sufficient to calculate a numeric water quality criterion or value: Indiana's proposed rules allowed for a larger change in water quality to be considered insignificant for pollutants without numeric criteria. While Indiana may distinguish between significant and insignificant lowering of water quality and not require antidegradation review for actions that result in an insignificant (i.e., *de minimis*) lowering of water quality, the determination of either type of threshold must be based on the extent of expected change in ambient water quality, not on the nature of the criterion. This is inconsistent with federal guidance on *de minimis* thresholds which requires that the significance of a new or increased discharge depends on the effect of the new or increased discharge on ambient water quality, not on the confidence a State has in the criteria derivation process.

EPA recommended that Indiana apply the same 10% *de minimis* exemption for pollutants with numeric criteria to all pollutants. Indiana accepted EPA's recommendation and revised the final rules consistent with EPA's recommendation.

Indiana's proposed cumulative cap on *de minimis* lowering of water quality of 25%: Indiana's draft rules included a proposed cumulative cap on the *de minimis* lowering of water quality of 25% of the unused loading capacity. This threshold was based on the threshold used under the Clean Air Act to identify Maximum Allowable Increases.

Federal courts reviewing previous EPA approvals of states' antidegradation provisions have found that *de minimis* provisions are only acceptable when both the individual actions are insignificant (i.e., *de minimis*) and the cumulative impacts of all the individual insignificant actions on a water body, taken together, are also insignificant. *Kentucky Waterways Alliance, et al. v. EPA, et al.*, 540 F.3d 466 (6th Cir. 2008). In EPA's opinion, loss of up to a quarter of the remaining assimilative capacity of a surface water without antidegradation review is not an insignificant lowering of water quality. EPA recommended that Indiana both individual and cumulative insignificant lowering of water quality to no more than 10% of the baseline assimilative capacity. Indiana's final rules adopt EPA's recommendation.

Indiana's proposed rules' exemption for certain actions that impact water quality from parts of the antidegradation requirement to demonstrate that a new or increased discharge is necessary to accommodate important social and economic development: The federal regulations allow new or increased discharges to lower water quality in high quality waters only after the lowering of water quality is demonstrated to be necessary to accommodate important social and economic development in the area in which the waters are located. Indiana's draft rules contained exemptions from the demonstration requirements for a number of types of activities that may impact water quality. While the "exemption demonstration" in Indiana's rules might address the federal requirement that any lowering of water quality be technologically necessary (no less degrading alternatives are available), it does not address the social and economic benefits component. To the extent that Indiana is finding, by rule, that the exempted

actions are always socially and economically beneficial, Indiana must provide some factual information in the record supporting that assertion. EPA expressed the position that without such data and analysis in the record, the demonstration is incomplete and therefore inconsistent with the Federal regulations.

Also, 327 IAC 2-1.3-4(b)(3)(B) and 327 IAC 2-1.3-4(b)(4)(A) contemplate offsetting new or increased discharges with other actions within the same 10 digit HUC. Offsetting provisions may be an acceptable basis for determining that antidegradation review is not triggered if it is clear that the offset results in no change in water quality at the point where the new or increased discharge will occur. EPA expressed the position that it is not clear that the spatial relationship between such actions will be such as to ensure that this requirement will be met in all circumstances that would qualify for this exemption.

EPA recommended that IDEM either delete the exemption provisions identified above and address these activities through the antidegradation review process on a case-by-case basis, or provide the data and analysis necessary to satisfy the antidegradation demonstration requirement for all the activities that might fall under one of these exemptions.

Indiana's adopted rules include a section exempting certain activities that Indiana considers to result in only insignificant lowering of water quality from antidegradation review. These are summarized in the table 1 below.

Table 1. Exemptions from Antidegradation Review (activities deemed to result in an insignificant lowering of water quality) 327 IAC 2-1.3-4		
Citation	Applicability	Description
(a)	ONRWs & OSRWs	Short-term and temporary increases of mercury and non BCCs
(b)	HQWs	Short-term and temporary lowering of water quality
(c)	HQWs	<i>De minimis</i> lowering of water quality for a non BCC or heat, changes in effluent quality due to normal variability within the existing capacity and processes that are covered by an existing applicable permit, bypasses not prohibited by 327 IAC 5-2-8(11), new limits for a regulated pollutant for an existing permitted discharger that will not allow an increase in either the mass or concentration of the regulated pollutant discharged, and increased loadings by a POTW of a regulated pollutant at an existing outfall discharging to a water of the state due to increasing the sewerage area, connection of new sewers and users, or acceptance of trucked-in wastes, such as septage and holding tank wastes, provided there is no increase in the existing NPDES permit limits, there is no increase beyond the treatment capacity of the facility, there is no significant change expected in the characteristics of the wastewater discharged and there is no increased loading of BCCs from nondomestic wastes.

The specific rule language of Indiana's proposed *de minimis* provisions:

"A new or increased loading of a non-BCC that is a demonstrated *de minimis* lowering of water quality as shown by the submission of sufficient information that allows the commissioner to verify the *de minimis* as determined according to the following:

(A) Calculation considerations according to the following:

(i) The proposed net increase in the loading of a regulated pollutant is less than or equal to ten percent (10%) of the available loading capacity determined at the time of the specific proposed new or increased loading of the regulated pollutant. The available loading capacity shall be established at the time of each request for a new or increased loading of a regulated pollutant.

(ii) The benchmark available loading capacity is equal to ninety percent (90%) of the available loading capacity established at the time of the request for the initial increase in the loading of a regulated pollutant.

(iii) For every request after the time of the request for the initial increase in the loading of a regulated pollutant, the available loading capacity remaining after the net increase in the loading of a regulated pollutant must be greater than or equal to the benchmark available loading capacity.

(B) For heat, except for loadings to Lake Michigan, the following conditions must be satisfied:

(i) The new or increased loading will not result in an increase in temperature in a stream or an inland lake, outside of the designated mixing zone, where applicable.

(ii) The new or increased loading will not result in an increase in waste heat of an amount in a stream greater than the amount determined by calculating the number of British thermal units (BTUs) required to raise the temperature of the stream design flow of the receiving stream by one (1) degree Fahrenheit.

(C) For loadings to Lake Michigan, relative to temperature and heat, the following conditions must be satisfied:

(i) The new or increased loading will not result in an increase in temperature as allowed in 327 IAC 2-1.5-8(c)(4)(D)(iv), at the edge of a one thousand (1,000) foot arc inscribed from a fixed point adjacent to the loading.

(ii) The new or increased loading will not result in an increase in waste heat in an amount greater than five-tenths (0.5) billion BTUs per hour."

EPA reviewed the exemptions from antidegradation based on insignificant lowering of water quality. The *de minimis* provisions for chemical pollutants ensure that both individual and cumulative impacts of *de minimis* lowering of water quality are considered. This is consistent with recent case law and EPA guidance. The thermal provisions is consistent with section 316 of the Act, which makes it consistent with 40 CFR 131.12(a)(4). The other aspects of (c) are either not an increase or address operational decisions within the context of an existing permit. These are consistent with the requirements in the Great Lakes Guidance, which is consistent with 40 CFR 131.12. 40 CFR 132, Appendix E. II. a. defines a significant lowering of water quality for a BCC as excluding, "changes in loadings for any BCC within the existing capacity and processes, and that are covered by the applicable control document." The provisions in Indiana's rule are consistent with this principle. Based on this analysis, EPA concludes that the antidegradation

exemption provisions contained in Indiana's adopted rules are consistent with the CWA and federal regulations and are approvable.

Indiana's adopted antidegradation implementation rules include up to four separate analysis and submittal components (Table 2, below). Which components an applicant is required to provide depends on the type of activity proposed. Indiana's draft rules recognize two groups of activities that are defined in the rule as having social and economic benefits (Table 3, below). Activities in these two groups are not required to submit an assessment of the social and economic benefits expected to occur as a result of the activity because the activities covered are defined by Indiana as beneficial. Activities identified in 327 IAC 2-1.3-5(b) are also not required to perform a treatment alternatives analysis.

Table 2, Indiana's Antidegradation Demonstration Components and Applicability to Classes of Activities, 327 IAC 2-1.3-5 (the specific rule language for each provision summarized below is provided in appendix 1)			
Antidegradation Demonstration Component	Activities deemed beneficial under 327 IAC 2-1.3-5(b)	Activities deemed beneficial under 327 IAC 2-1.3-5(d)	All other activities
(a) General information about the proposed activity	Yes	Yes	Yes
(c) Demonstration that the lowering of water quality is necessary	Yes	Yes	Yes
(e) Consideration of treatment alternatives	No	Yes	Yes
(g) Social and economic benefits analysis	No	No	Yes

Table 3, Classes of Activities Deemed Beneficial in Indiana's Proposed Antidegradation Rules at (327 IAC 2-1.3-5)

Citation	Activities Covered
(b)	A change in loading of a regulated pollutant due solely to implementation of stormwater controls when there is no net increase in the quantity and concentration of the regulated pollutant to the same ten (10) digit watershed.
	A new or increased loading of a regulated pollutant due to a response action under CERCLA, A corrective action under RCRA, or An action utilizing federal or state authorities with regulations to alleviate a release into the environment of hazardous substances, pollutants, or contaminants that may pose an imminent or existing and substantial danger to public health or welfare
	A new or increased loading of noncontact cooling water that will not increase the temperature of the receiving water or waters outside of the designated mixing zone, where applicable, increase the loading of BCCs, or require numeric water quality-based effluent limitations (WQBELs) for toxic substances or WET as determined under 327 IAC 5-2-11.5
	A new or increased loading of an approved non-BCC water treatment additive
	A change in loading of a regulated pollutant where there is a voluntary, simultaneous, enforceable decrease in the actual loading of the regulated pollutant from sources contributing to the same ten (10) digit watershed; and with the result that there is a net decrease in the loading of the regulated pollutant to the same ten (10) digit watershed
	A new or increased loading of a regulated pollutant from a sanitary wastewater treatment plant constructed or expanded to alleviate a public health concern, for example, a connection of existing residences currently on septic systems
(d)	A new or increased loading of a regulated pollutant where the new or increased loading is necessary to accomplish a reduction in the loading of another regulated pollutant and there will be an improvement in water quality in the receiving water or waters. An improvement in water quality is deemed to occur if the impact from the new or increased loading of the regulated pollutant is less bioaccumulative; and less toxic than the reduced pollutant or pollutant parameter
	A new or increased loading of a regulated pollutant where the new or increased loading is necessary to accomplish a reduction in the release of one (1) or more air pollutants; and there will be an environmental improvement that will occur when the applicant demonstrates that the reduction in the loading of the air pollutant is necessary to meet a state or federal air quality standard or emission requirement; or will substantially reduce human exposure to hazardous air pollutants or other air pollutants that are subject to state or federal air quality standards

EPA reviewed the provisions identified above. The federal regulations at 40 CFR 131.12 (a)(2) state that a lowering of water quality in a high quality water may be allowed if, "the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to

accommodate important social or economic development in the areas in which the waters are located.” Indiana’s rulemaking process for the implementation rules deem the activities in 327 IAC 2-1.3-5(b) and (d) to be beneficial satisfies the required finding of social and economic development by a state prior to authorizing a lowering of water quality at 40 CFR 131.12(a)(2) by finding that these actions accommodate important social or economic development and by providing opportunity for public participation through the rulemaking process. Indiana’s approach is understandable because the social and economic benefits of the types of activities contemplated by 327 IAC 2-1.3-5(b) and (d) cannot be assessed using a standard social and economic development analysis as described in EPA’s draft interim economic guidance, although the activities are anticipated to result in some lowering of water quality. By incorporating these findings into rule, Indiana also provides an opportunity for public review and comment, consistent with the public participation and coordination requirements in 40 CFR 131.12 (a)(2). Members of Indiana’s public environmental advocacy community commented on earlier versions of these provisions, but did not raise issues with these provisions in the two hearings on the final rules held prior to adoption. In fact, members of the environmental advocacy community urged EPA to send Indiana a letter urging adoption of the final rules. Indiana’s rules require each activity covered by IAC 2-1.3-5(b) to perform a project-specific demonstration that the lowering of water quality is actually necessary and those covered by IAC 2-1.3-5(c) to demonstrate that the lowering of water quality is necessary and that there are no treatment alternatives that would reduce or eliminate the need for the lowering of water quality. Given the state findings in rule and the project-specific submittal and demonstration requirements that must be accompany a proposal and be approved by Indiana before a project can proceed, EPA believes that the complete approval process satisfies the requirements of 40 CFR 131.12(a)(2) and is therefore consistent with 40 CFR 131.12 and approvable.

Sequence of antidegradation demonstration: EPA suggested moving the pollution prevention analysis nearer the beginning of the antidegradation demonstration. In the rules adopted by Indiana, pollution prevention is the first degradation mitigation technique considered.

Definition for endangered and threatened species: EPA recommended that the scope of the definition be expanded to include the protection of critical habitat. Indiana’s adopted rules include designated critical habitat in the definition.

EPA also recommended that Indiana consider a way to reference the lists of state and federal listed species such that new versions of the list could be used without changing the rule language. Indiana’s rules on rule writing do not allow Indiana to implement these suggestions.

Additional Definitions: EPA suggested Indiana add definitions for the following terms:

- Definition of “application”
- Best Available Demonstrated Control Technology (BADCT)
- Definition of “Recommencing Discharge”
- Absence of a definition for “New Discharger”

Indiana added a definition of the term, “best available demonstrated control technology” as requested. The other terms are not used in the adopted antidegradation rules.

Antidegradation Review of Activities Covered by General Permits: The draft rules included a provision at 327 IAC 2-1.3-1(c)(1) covering the application of antidegradation to general permits that stated:

“The department shall complete an antidegradation review of the rules of the board that authorize the NPDES permit.”

These rules were written contemplating a permit by rule approach to general permits. EPA’s concern was that the draft rule was unclear regarding the board rules to which the antidegradation review shall be applied. The term rules in paragraph (1) implies that it is intended to apply to 327 IAC 15, Rule 1 General Provisions and Rule 2 Basic NPDES General Permit Rule Requirements, Rule 3 NOI Letter Requirements, Rule 4 Standard Conditions for NPDES General Permit Rules rather than a specific permit by rule (e.g. Rule 5. Storm Water Run-Off Associated with Construction Activity). EPA recommended that paragraph (1) be revised to ensure that an antidegradation review is conducted on each general permit issued by the state. In addition, paragraph (3) stated:

“After an antidegradation review of a rule is conducted, activities covered by an NPDES general permit authorized by that rule are not required to undergo an antidegradation review.”

It is not clear how a permanent blanket exemption from antidegradation review is either appropriate or consistent with the federal antidegradation and permitting requirements. Since treatment and pollution control technologies change over time, regular reconsider of the antidegradation review of general permits is warranted with each renewal of the general permit. EPA recommended that the general permit provisions identified above be revised to clarify that an antidegradation review is required of each general permit as it is issued and reissued.

The adopted rules at 327 IAC 2-1.3-1(c) state:

(c) The antidegradation implementation procedures for activities covered by an NPDES general permit authorized by the department apply according to the following:

(1) The department shall complete an antidegradation review of the NPDES general permits.

(2) After an antidegradation review of an NPDES general permit is conducted, activities covered by that NPDES general permit are not required to undergo an additional antidegradation review.

These revisions are consistent with EPA’s recommendations on the draft rule.

Summary of comments at the hearing on final adoption received from stakeholders:

Indiana’s antidegradation rules were the subject of six separate opportunities for public comment: first notice, second notice, third notice, a public hearing on July 27, 2011, and a public hearing on September 14, 2011. Revisions to the proposed rules were made after each of

the comment opportunities except for the September 14, 2011 hearing. Consequently, this summary focuses only on those comments submitted for the September 14, 2011 public hearing. Key comments received and IDEM's responses are summarized below.

Comment summary: The proposed rules should be modified to only apply to NPDES permitting.

IDEM response: IDEM responded that to comply with the Clean Water Act, Indiana's antidegradation standards apply to all surface waters in Indiana. Where an activity undertaken by IDEM is required to comply with water quality standards, it must comply with antidegradation, which is part of Indiana's water quality standards.

EPA response: EPA agrees with IDEM's response.

Comment summary: The antidegradation rules should apply only to pollutants for which a numeric water quality criterion has been adopted, since a numeric criterion is needed for the implementation of the *de minimis* provisions of the proposed rules.

IDEM response: IDEM believes it is appropriate to include narrative criteria in the definition of regulated pollutant because that there are pollutants that do not currently have a numeric water quality standard that do merit regulatory review. IDEM recognizes that narrative water quality criteria cannot be used to establish a *de minimis* lowering of water quality because a numeric value is necessary to develop the available loading capacity. However, in practice, for NPDES permits, the narrative criteria of Indiana's water quality standards are protected through the establishment of numeric effluent limitations. These numeric effluent limitations are based on an applied wastewater treatment technology such as an oil/water separator or a sedimentation lagoon.

EPA response: EPA notes that Indiana has rules applicable within the Great Lakes basin for deriving a numeric expression of a narrative criterion appropriate for use with pollutants that are toxic to aquatic life that could be used to derive a numeric value for a pollutant without an adopted criterion for purposes of implementing the *de minimis* provisions of Indiana's newly-adopted antidegradation rules.

Comment summary: The definition of toxic substances in the draft rule is unacceptably vague. (IUG)

IDEM response: IDEM believes the definition of toxic substances is appropriate: "'Toxic substances' means substances that are or may become harmful to:

- (A) aquatic life;
- (B) humans;
- (C) other animals;
- (D) plants; or
- (E) food chains;

when present in sufficient concentrations or combinations. The term includes those substances identified as toxic under Section 307(a)(1) of the CWA." This definition is consistent with the definition used in other Indiana rules.

EPA response: EPA agrees with Indiana's response.

Comment summary: The draft rule does not take into account the regional nature of the electric utility industry where power plants located in one locality may benefit those living in more distant localities.

IDEM response: The economic and social factors listed for evaluation, where relevant, in an antidegradation demonstration are those identified in statute at IC 13-18-3-2 (s). One of these factors, found in the rule at Section 5 (g) (5) (P) is: "Inclusion by the applicant of additional factors that may enhance the social or economic importance associated with the proposed discharge, such as an approval that recognizes social or economic importance and is given to the applicant by: (i) a legislative body; or (ii) other government officials." This would allow for the inclusion of information on regional and state level impacts.

EPA response: EPA agrees with Indiana's response. EPA notes that the federal regulations at 40 CFR 131.12(a)(2) states that a state may allow lower water quality in a high quality water when the state determines, "...that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located." As indicated in the response, Indiana's rules have sufficient flexibility to allow an applicant to present information on regional and state level impacts and how those comport with the requirements of the standard.

Comment summary: Indiana's antidegradation rules should allow for 316(a) thermal variances in waters identified as ONRWs.

IDEM response: The antidegradation standard is consistent with federal regulation which only allows for temporary reductions in water quality in Outstanding National Resource Waters – see 40 CFR § 131.12(a)(3).

EPA response: EPA agrees with Indiana's response.

Comment summary: The Department of Natural Resources (DNR) asked that the rule return to the original rule language concerning state threatened and endangered species and include provisions to consider state species that rely on water and are affected by its quality.

IDEM Response: IDEM agrees that the definition of endangered or threatened species in the antidegradation standards and implementation rule should include state listed endangered or threatened species and has suggested an amendment to the definition for final adoption.

EPA response: EPA agrees with Indiana's response.

Comment summary: The rules allow for short-term and temporary increases in mercury to OSRWs. New and increased discharges of other BCCs to OSRWs are prohibited. Two questions arise from the rule treating mercury different from other BCCs: (1) How will IDEM determine whether a mercury loading to a tributary will impact an OSRW in order to decide

whether the loading should be reviewed under the Tier 2 or Tier 2.9 standard; and (2) will IDEM require that the proposed water quality improvement projects offered to compensate for a mercury loading to an OSRW be restricted to those that remove a greater amount of mercury from the watershed, or will IDEM attempt to assess the toxicity of other chemicals in comparison to mercury to allow a broader range of projects?

IDEM Response: IDEM believes it is appropriate to recognize the ubiquitous nature of mercury. Failing to recognize that fact by setting the antidegradation standard at no new or increased discharge makes the standard impossible to meet. This does not mean that the toxicity of mercury is ignored. The proposed rule does not allow for a *de minimis* lowering of water quality for any bioaccumulative chemical of concern (BCC), including mercury. Any lowering of water quality is a significant lowering of water quality requiring some level of an antidegradation demonstration unless it is an exempt, short-term, temporary discharge.

In answer to question (1): Mixing zones for mercury are not allowed in any Indiana waters. Any discharge of mercury into waters of the state at a concentration higher than the representative background concentration will result in a lowering of water quality in the receiving waters and a discharge of mercury that results in a lowering of water quality in a tributary to an OSRW may also result in a lowering of water quality in the OSRW if the higher concentration of mercury reaches the OSRW. In answer to question (2) According to IC 13-18-3(1)(2)(A) the water quality improvement projects must result in "Implementation of a water quality project in the watershed of the outstanding state resource water that will result in an overall improvement of the water quality of the outstanding state resource water." The term "overall improvement of the water quality of the OSRW" was not defined by the legislature. One approach is to require any water quality improvement project to offset the loading of the specific pollutant or pollutants from a proposed new or increased loading to ensure that any approved project results in a net reduction in the pollutants. An alternate approach is to require that any water quality improvement project results in an overall improvement demonstrated by other environmental benefits including restoration of wildlife habitat which may not result in much, if any, reduction in the pollutant(s) proposed for discharge to the waters. Both of these approaches will result in an overall improvement in the water quality of the OSRW, but in very different ways. IDEM will, therefore, consider all options and approaches for potential water quality improvement projects.

EPA response: Indiana's antidegradation requirements for OSRWs are at least as stringent as the requirements of 40 CFR 131.12(a)(2) and are therefore consistent with the applicable federal requirements.

Comment summary: Will Indiana issue guidance to provide greater detail on how Indiana will treat mercury under the Tier 2 and Tier 2.9 standards and with regard to the water quality improvement project?

IDEM Response: IDEM is committed to a workable antidegradation rule and will evaluate the need for and timing of supplemental materials and guidance documents as the rulemaking process moves forward, while recognizing the importance of avoiding any further unnecessary delays in this rulemaking process.

EPA response: EPA has nothing to add to Indiana's response.

Comment summary: Indiana's draft rule allows pollutant trading on the watershed scale. This conflicts with the antidegradation standard that requires a demonstration to show that a lowering of water quality accommodates important economic or social development in the area of the water that is receiving the additional pollution. The change to allow pollutant trading on the watershed scale would allow pollutant trading between one community and area versus another community and area so it is no longer a trade in the area in which the receiving water is located. This change to allow trading on the watershed scale violates the Clean Water Act policy for antidegradation.

IDEM Response: The proposed rules no longer exempt pollution trading activities from all of the antidegradation demonstration requirements, but require some level of an antidegradation demonstration including a demonstration that the activity is necessary when compared to options for no degradation, minimal degradation and degradation mitigation techniques or alternatives. IDEM believes the 10 digit watershed is an appropriate scale to evaluate pollution trading.

EPA response: EPA reviewed Indiana's trading provisions and considers them to be consistent with the federal antidegradation requirements because they satisfy the requirements of 40 CFR131.12(a)(2). The federal regulations and guidance allow states some discretion in determining the area affected by a lowering of water quality and EPA believes Indiana's rules are within the acceptable range of approaches.

Comment summary: The 10-digit watershed scale for environmental improvement projects is an understandable attempt to keep environmental benefits closer to the site of the water degradation, but the 10-digit watershed is still too large in scale to keep the improvements in the area in which the receiving water is located.

IDEM Response: IDEM believes the 10 digit watershed is an appropriate scale for demonstrating improvement in water quality due to an environmental improvement project.

EPA response: EPA does not have any guidance on defining the area affected by the lowering of water quality.

Comment summary: The need for an antidegradation review should be based on a request for a revised or new permit limit.

IDEM response: IDEM believes it is appropriate for the rule to address all regulated discharges that result in a significant lowering of water quality. IDEM believes the concerns raised about changes in process within an existing NPDES permit are addressed by the exemptions found in the proposed rule in Section 4(c)(2):

"A new or increased loading that results from one (1) of the following activities that does not require the submission of information beyond what is required to comply with the discharger's existing applicable permit:

(A) A change in loading of a regulated pollutant within the existing capacity and processes that are covered by an existing applicable permit, including, but not limited to, the following:

- (i) Normal operational variability, including, but not limited to, intermittent increased loadings due to wet weather conditions.
- (ii) A change in intake water pollutants not caused by the discharger.
- (iii) Increasing the production hours of the facility, for example, adding a second shift.
- (iv) Increasing the rate of production.
- (v) A change at an internal outfall that does not directly discharge to a surface water of the state.
- (vi) A change in the applicable effluent limitation guideline based on a change in production.

(B) A bypass not prohibited by 327 IAC 5-2-8(11).

(C) A new limit for a regulated pollutant for an existing permitted discharger that will not allow an increase in either the mass or concentration of the regulated pollutant discharged, including a new limit that is a result of one (1) of the following:

- (i) New or improved:
 - (AA) monitoring data; or
 - (BB) analytical methods.
- (ii) New or modified:
 - (AA) water quality criteria; or
 - (BB) effluent limitation guidelines, pretreatment standards, or control requirements for POTWs.

(D) An increased loading of a regulated pollutant at an existing outfall discharging to a water of the state due to increasing the sewered area, connection of new sewers and users, or acceptance of trucked-in wastes, such as septage and holding tank wastes, by a POTW, provided the following are true:

- (i) There is no increase in the existing NPDES permit limits.
- (ii) There is no increase beyond the treatment capacity of the facility.
- (iii) There is no significant change expected in the characteristics of the wastewater discharged.
- (iv) There is no increased loading of BCCs from nondomestic wastes."

EPA response: EPA agrees with Indiana's response.

Comment summary: The rules should not include a cumulative cap on *de minimis* lowering of water quality.

IDEM response: Every new or increased discharge that will result in a lowering of water quality must be evaluated at the time of the request to determine if the new or increased loading will result in a significant lowering of water quality. A significant lowering of water quality will occur when the new or increased discharge will use more than 10% of the available loading capacity or when the new or increased discharge will result in an available loading capacity that is less than the benchmark loading capacity.

The circumstance described in the comment assumes that the starting available loading capacity and the benchmark loading capacity are equal, due to an existing discharger accepting a previous increase in effluent limits equal to 10% of the available loading capacity established at the time of the previous request. If the second increased loading of the same regulated pollutant is accompanied with additional wastewater flow that increases the design flow of the discharge, then the additional wastewater discharge flow will be included in the calculation of the total loading capacity. The increase in the total loading capacity and the available loading capacity are both equal to the water quality criterion times the increase in the wastewater design flow. The background loading remains the same since the upstream flow has not increased and the background concentration should be measured upstream of the discharge. In this example the increase in the discharger design flow is equal to 10 % of the flow used to establish the original total loading capacity. With an increase in the discharger design flow there will always be an increase in the total and available loading capacity. The increased discharge is limited by the benchmark loading capacity of 10% of the original available loading capacity which is equal to the individual discharge *de minimis* value. When an increased loading is not accompanied with an increase in the design flow and the available loading capacity is equal to the benchmark available loading capacity, then any increased loading, unless it is exempt, will trigger the need for some level of an antidegradation demonstration.

EPA response: EPA's policy is that states may include a *de minimis* provision in their antidegradation implementation procedures and EPA will approve such procedures provided both the individual and cumulative effects of *de minimis* on water quality are insignificant. EPA's August 8, 2005 policy memorandum on tier 2 antidegradation reviews and significance thresholds states this policy (EPA, 2005).

3. EPA action on the final rule revisions submitted by Indiana

a. Description of Indiana's revised antidegradation policy and implementation procedures:

327 IAC 2-1.3-1 Applicability of antidegradation standards and implementation procedures

This section addresses the applicability of Indiana's antidegradation policy and implementation procedures. According to the new rules, the antidegradation standard applies to all surface waters in Indiana. The implementation procedures apply, "to a proposed new or increased loading of a regulated pollutant to surface waters of the state from a deliberate activity subject to the Clean Water Act, including a change in process or operation that will result in a significant lowering of water quality." The term, "significant lowering of water quality" is defined as:

(A) there is a new or increased loading of a regulated pollutant to a surface water of the state that results in an increase in the ambient concentration of the regulated pollutant and the increased loading is greater than a *de minimis* lowering of water quality; and (B) none of the provisions of section 4 of this rule applies.

The term “regulated pollutant” is defined as any pollutant covered by a numeric or narrative water quality criterion or that might be limited in a NPDES permit. Based on these definitions, EPA concludes that the standard and implementation procedures are applied in a manner consistent with the CWA and federal regulations. 327 IAC 2-1.3-1(c) pertaining to general permits specify the process through which the requirements of the antidegradation rules will be met for general permits in Indiana.

EPA Action: Approve 327 IAC 2-1.3-1.

327 IAC 2-1.3-2 Definitions

This section includes definitions of terms used in the antidegradation rules. EPA reviewed the definitions and determined that Indiana’s definitions were consistent with the requirements of 40 CFR 131.12 and 40 CFR 132, Appendix E.

EPA Action: Approve 327 IAC 2-1.3-2

327 IAC 2-1.3-3 Antidegradation Standard

This section includes Indiana’s antidegradation standards for the three tiers of antidegradation found in the federal regulations at 40 CFR 131.12 and 40 CFR 132, Appendix E.I.: protection of existing uses, protection of high quality waters, and protection of waters identified as outstanding national resources waters. Indiana’s adopted rules also address state resource waters, an Indiana-specific tier intermediate between high quality waters and outstanding national resource waters. EPA reviewed Indiana’s antidegradation standards for each of the tiers required by 40 CFR 131.12 and finds that the requirements of Indiana’s antidegradation standards are consistent with the requirements of 40 CFR 131.12 and 40 CFR 132, Appendix E. EPA reviewed the standard applicable to Indiana’s state resource waters and finds that it is at least as stringent as the requirements at 40 CFR 131.12 and 40 CFR 132, Appendix E applicable to high quality waters.

EPA Action: Approve 327 IAC 2-1.3-3.

327 IAC 2-1.3-4 Exemptions from the antidegradation demonstration requirements and the water quality improvement project or payment to the OSRW improvement fund requirements.

This rule allows exemptions from antidegradation review for certain activities. These are summarized below.

Table 1. Exemptions from Antidegradation Review (activities deemed to result in an insignificant lowering of water quality) 327 IAC 2-1.3-4		
Citation	Applicability	Description
(a)	ONRWs & OSRWs	Short-term and temporary increases of mercury and non BCCs
(b)	HQWs	Short-term and temporary lowering of water quality
(c)	HQWs	<i>De minimis</i> lowering of water quality for a non BCC or heat, changes in effluent quality due to normal variability within the existing capacity and processes that are covered by an existing applicable permit, bypasses not prohibited by 327 IAC 5-2-8(11), new limits for a regulated pollutant for an existing permitted discharger that will not allow an increase in either the mass or concentration of the regulated pollutant discharged, and increased loadings by a POTW of a regulated pollutant at an existing outfall discharging to a water of the state due to increasing the sewerage area, connection of new sewers and users, or acceptance of trucked-in wastes, such as septage and holding tank wastes, provided there is no increase in the existing NPDES permit limits, there is no increase beyond the treatment capacity of the facility, there is no significant change expected in the characteristics of the wastewater discharged and there is no increased loading of BCCs from nondomestic wastes.

The *de minimis* provisions for chemical pollutants are intended to ensure that both individual and cumulative impacts of *de minimis* lowering of water quality are considered. This is consistent with recent case law and EPA guidance. The thermal provisions are consistent with section 316 of the Act. The other aspects of (c) are either not an increase or address operational decisions within the context of an existing permit. These are consistent with the requirements in the Great Lakes Guidance. 40 CFR 132, Appendix E. II. a. defines a significant lowering of water quality for a BCC as excluding, “changes in loadings for any BCC within the existing capacity and processes, and that are covered by the applicable control document.” The provisions in Indiana’s rule are consistent with this principle.

EPA Action: Approve 327 IAC 2-1.3-4

327 IAC 2-1.3-5 Antidegradation demonstration.

This rule addresses the implementation of the antidegradation demonstration for high quality waters. Indiana’s proposed antidegradation implementation rules include up to four separate analysis and submittal components (Table 2, below). Which components an applicant is required to provide depends on the type of activity proposed. Indiana’s draft rules recognize two groups of activities that are defined in the rule as having social and economic benefits (Table 3, below). Activities in these two groups are not required to submit an assessment of the social and economic benefits expected to occur as a result of the activity because the activities covered are

defined by Indiana as beneficial. Activities identified in 327 IAC 2-1.3-5(b) are also not required to perform a treatment alternatives analysis.

Table 2, Indiana's Antidegradation Demonstration Components and Applicability to Classes of Activities, 327 IAC 2-1.3-5 (the specific rule language for each provision summarized below is provided in appendix 1)			
Antidegradation Demonstration Component	Activities deemed beneficial under 327 IAC 2-1.3-5(b)	Activities deemed beneficial under 327 IAC 2-1.3-5(d)	All other activities
(a) General information about the proposed activity	Yes	Yes	Yes
(c) Demonstration that the lowering of water quality is necessary	Yes	Yes	Yes
(e) Consideration of treatment alternatives	No	Yes	Yes
(g) Social and economic benefits analysis	No	No	Yes

Table 3, Classes of Activities Deemed Beneficial in Indiana's Proposed Antidegradation Rules at (327 IAC 2-1.3-5)	
Citation	Activities Covered
(b)	A change in loading of a regulated pollutant due solely to implementation of stormwater controls when there is no net increase in the quantity and concentration of the regulated pollutant to the same ten (10) digit watershed.
	A new or increased loading of a regulated pollutant due to a response action under CERCLA, A corrective action under RCRA, or An action utilizing federal or state authorities with regulations to alleviate a release into the environment of hazardous substances, pollutants, or contaminants that may pose an imminent or existing and substantial danger to public health or welfare
	A new or increased loading of noncontact cooling water that will not increase the temperature of the receiving water or waters outside of the designated mixing zone, where applicable, increase the loading of BCCs, or require numeric water quality-based effluent limitations (WQBELs) for toxic substances or WET as determined under 327 IAC 5-2-11.5
	A new or increased loading of an approved non-BCC water treatment additive
	A change in loading of a regulated pollutant where there is a voluntary, simultaneous, enforceable decrease in the actual loading of the regulated pollutant from sources contributing to the same ten (10) digit watershed; and with the result that there is a net decrease in the loading of the regulated pollutant to the same ten (10) digit watershed

	A new or increased loading of a regulated pollutant from a sanitary wastewater treatment plant constructed or expanded to alleviate a public health concern, for example, a connection of existing residences currently on septic systems
(d)	<p>A new or increased loading of a regulated pollutant where the new or increased loading is necessary to accomplish a reduction in the loading of another regulated pollutant and there will be an improvement in water quality in the receiving water or waters. An improvement in water quality is deemed to occur if the impact from the new or increased loading of the regulated pollutant is less bioaccumulative; and less toxic than the reduced pollutant or pollutant parameter</p> <p>A new or increased loading of a regulated pollutant where the new or increased loading is necessary to accomplish a reduction in the release of one (1) or more air pollutants; and there will be an environmental improvement that will occur when the applicant demonstrates that the reduction in the loading of the air pollutant is necessary to meet a state or federal air quality standard or emission requirement; or will substantially reduce human exposure to hazardous air pollutants or other air pollutants that are subject to state or federal air quality standards</p>

EPA reviewed this rule. The existing federal regulations at 40 CFR 131.12 (a)(2) state that a lowering of water quality in a high quality water may be allowed if, “the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State’s continuing planning process, that allowing lower water quality is necessary to accommodate important social or economic development in the areas in which the waters are located.” In drafting these proposed rules that deem the activities in 327 IAC 2-1.3-5(b) and (d) to be beneficial, Indiana satisfies the required finding of social and economic development by a state prior to authorizing a lowering of water quality. Indiana’s approach is understandable because the types of activities contemplated by 327 IAC 2-1.3-5(b) and (d) do not lend themselves to a standard social and economic development analysis as described in EPA’s draft interim economic guidance, although the activities are anticipated to result in some lowering of water quality. By incorporating these findings into rule, Indiana also provides an opportunity for public review and comment, consistent with the public participation and coordination requirements in 40 CFR 131.12 (a)(2). Members of Indiana’s public environmental advocacy community reviewed the proposed rules prior to the public hearing on final adoption and asked EPA to send Indiana a letter supporting adoption of the rules by the Indiana Water Pollution Control. Indiana’s rules require each activity covered by IAC 2-1.3-5(b) to perform a project-specific demonstration that the lowering of water quality is actually necessary and those covered by IAC 2-1.3-5(c) to demonstrate that the lowering of water quality is necessary and that there are no treatment alternatives that would reduce or eliminate the need for the lowering of water quality. Given the state findings in rule and the project-specific submittal and demonstration requirements that must be accompany a proposal and be approved by Indiana before a project can proceed, the complete approval process satisfies the requirements of 40 CFR 131.12(a)(2) and 40 CFR 132, Appendix E and determined that the rule is consistent with the requirements of 40 CFR 131.12 and 40 CFR 132, Appendix E.

EPA Action: Approve 327 IAC 2-1.3-5.

327 IAC 2-1.3-6 Commissioner's determination.

This rule addresses the decision making process to be used by the IDEM Commissioner for antidegradation reviews. EPA reviewed this rule and determined that the rule is consistent with the requirements of 40 CFR 131.12 and 40 CFR 132, Appendix E.

EPA Action: Approve 327 IAC 2-1.3-6.

327 IAC 2-1.3-7 Water quality improvement project or payment to the OSRW improvement fund.

EPA reviewed the standard applicable to Indiana's state resource waters and finds that it is at least as stringent as the requirements at 40 CFR 131.12 and 40 CFR 132, Appendix E applicable to high quality waters.

EPA Action: Approve 327 IAC 2-1.3-7.

327 IAC 2-1.5-6 Bioaccumulative chemicals of concern.

This rule lists the bioaccumulative chemical of concern. Indiana made non-substantive changes to conform with the changes to 327 IAC 2-1.3. All of the changes are consistent with 40 CFR 131.12 and 40 CFR 132, Appendix E.

EPA Action: Approve changes to 327 IAC 2-1.5-6.

327 IAC 2-1.5-18 Designation of a waterbody as a limited use water or an outstanding state resource water.

Non-substantive changes to conform with changes to 327 IAC 2-1.3. All of the changes are consistent with 40 CFR 131.12 and 40 CFR 132, Appendix E.

EPA Action: Approve changes to 327 IAC 2-1.5-18.

327 IAC 5-2-11.2 Public notice of comment period and public meetings for site-specific modification of water quality criteria and values; an antidegradation demonstration; a water quality improvement project; an alternate mixing zone demonstration; a variance.

The changes to this provision consist of non-substantive changes to conform with the 327 IAC 2-1.3 as well as adoption of a new requirement regarding public meetings regarding antidegradation proposals. The new requirement is that at least 25 people within a 10 digit HUC watershed in which the proposal is located must request a public meeting before Indiana is obliged to hold a meeting. The opportunities for public review and comment are not changed.

EPA reviewed this rule. The substantive requirements in the federal regulations regarding public participation in an antidegradation decision are a lowering of water quality in a high quality water cannot occur without public participation. The federal regulations at 40 CFR 131.12 and

40 CFR 132, Appendix E do not provide specific requirements applicable to public meetings as part of an antidegradation review. Indiana's antidegradation procedures in this rule ensure public participation in the antidegradation process through public notice and comment with an opportunity for a public meeting if there is sufficient interest. Indiana's rules satisfy the substantive requirements of the federal regulations at 40 CFR 131.12 and 40 CFR 132, Appendix E for public participation in the antidegradation process. Therefore, EPA finds that 327 IAC 5-2-11.2 is consistent with 40 CFR 131.12 and 40 CFR 132, Appendix E.

EPA Action: Approve changes to 327 IAC 5-2-11.2.

327 IAC 5-2-12.1 Great Lakes systems dischargers; schedules of compliance.

The changes to this existing rule consist of one editorial change and changes to conform with changes to 327 IAC 2-1.3. This rule is part of Indiana's NPDES permit program and not subject to review and approval under section 303(c) of the CWA.

EPA Action: Not a water quality standard subject to review and approval under section 303(c) of the CWA. Non-substantive and conforming changes.

327 IAC 5-3-8 Fact sheet.

Editorial changes to conform with changes to 327 IAC 2-1.3. This rule is part of Indiana's NPDES permit program and not subject to review and approval under section 303(c) of the CWA.

EPA Action: Not a water quality standard subject to review and approval under section 303(c) of the CWA. Non-substantive editorial and conforming changes.

327 IAC 15-2-6 Exclusions.

Editorial changes to conform with changes to 327 IAC 2-1.3. This rule is part of Indiana's NPDES permit program and not subject to review and approval under section 303(c) of the CWA.

EPA Action: Not a water quality standard subject to review and approval under section 303(c) of the CWA.

SECTION 8. THE FOLLOWING ARE REPEALED: 327 IAC 2-1-2; 327 IAC 2-1.5-4; 327 IAC 5-2-11.3; 327 IAC 5-2-11.7. These replace by the rules above.

IV. Documents Considered by EPA:

In addition to the documents submitted by Indiana, EPA consulted the following documents:

- 40 CFR 131.12
- 40 CFR 132, Appendix E.
- EPA's Water Quality Standards Handbook: Second Edition, EPA-823-B-12-002; March 2012.
- EPA's Economic Guidance for Water Quality Standards, <http://water.epa.gov/scitech/swguidance/standards/economics/index.cfm>.
- EPA policy memorandum: "Tier 2 antidegradation reviews and significance thresholds," Ephraim King, Director, Office of Science and Technology, August 8, 2005.
- EPA policy memorandum: "Antidegradation policy approvals and Endangered Species Act consultations." Tudor Davies, Director, Office of Science and Technology, January 27, 2005.

V. Endangered Species Act (ESA) Requirements:

Indiana's antidegradation rules are consistent with the requirements of the federal regulations at 40 CFR 131.12. Upon review of EPA's regulatory authority, EPA has determined that it lacks relevant discretion to implement measures that would benefit listed species in connection with antidegradation policy approvals. Thus, EPA is not required to consult on the approval of antidegradation policies with the US Fish and Wildlife Service. If a state or authorized tribe submits to EPA for review an antidegradation policy that meets the requirements of 40 CFR §§131.12 and 132, Appendix E, then EPA is required by the CWA to approve the policy. Because EPA lacks authority to require the state or tribe to provide more than the minimum elements required by federal regulations, EPA lacks discretion to require inclusion of measures that would benefit listed species. Therefore, consultation is not required, consistent with the ESA and the Services' implementing regulations at 50 CFR §402.03.

VI. Tribal Consultation:

The Pokagon Band of Potawatomi in Michigan has tribal resources in Indiana that could be impacted by Indiana's revised antidegradation rules. EPA met with Mark Parrish and Grant Poole, representatives of the Pokagon Band of Potawatomi, on Tuesday September 25, 2012. EPA briefed Mr. Parrish and Mr. Poole on the Indiana rule revisions and explained the basis for EPA determination that Indiana's rules are consistent with the CWA and applicable federal regulations and approvable under section 303(c) of the CWA. The representatives of the Pokagon Band of Potawatomi determined that the Indiana antidegradation rules would be unlikely to impact tribal resources and that formal consultation would not be necessary.

